No. 13,393

IN THE

United States Court of Appeals

For the Ninth Circuit

FRED G. STEVENOT, Trustee of Coastal Plywood & Timber Company, a Corporation, Debtor,

Appellant,

vs.

J. W. NORBERG, NILS G. MATSON, MERRITT W. TALLMAN, MILO F. BARNHART, ROLAND C. ZIMMERMANN, FLOYD C. JACKSON, GLADYS M. ZIMMERMANN, EDWIN H. JASMANN, FRANK SUTTON, GEORGE F. SCOTT and JOHN E. VICK,

Appellees.

Opening Brief of Appellant

Appeals from the United States District Court,
Northern District of California,
Northern Division

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SUBJECT INDEX

STATUTES

OTHER

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STATEMENT OF JURISDICTION

1. Jurisdiction of District Court.

Appellant is the Trustee of Coastal Plywood & Timber Company, Debtor in proceedings for the reorganization of said Company pursuant to Chapter X of the *Bankruptcy*

Act now pending before the United States District Court for the Northern District of California, Northern Division (Tr. pp. 48-49). On February 9, 1952, appellees filed their petition in said proceedings alleging, in substance, that they were laid off or discharged as employees of the Debtor on December 28, 1951, and seeking reinstatement as such employees and reimbursement for amounts lost as a result of the layoff or discharge (Tr. pp. 10-18).

On February 11, 1952, appellant filed his motion to dismiss said petition upon the ground, among others, that:

> "1. The above-entitled Court has no jurisdiction of these proceedings for reinstatement or by reason of any of the things or facts set forth in said petition for reinstatement." (Tr. pp. 19, 26)

Said motion to dismiss was denied (Tr. pp. 27, 35), but the exact basis upon which the District Court predicated jurisdiction is not clear to appellant.

2. Jurisdiction of Court of Appeals.

The orders from which these appeals are taken were entered by the United States District Court in proceedings pursuant to Chapter X of the *Bankruptcy Act.* This Court is vested with appellate jurisdiction by Section 24 of the *Bankruptcy Act* (11 U.S.C.A., Sec. 47), which provides, in part, as follows:

> "a. The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now, or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bank-

ruptcy, to review, affirm, revise or reverse, both in matters of law and in matters of fact * * *."

"b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal. * * *"

and by Section 121 of the Bankruptcy Act (11 U.S.C.A., Sec. 521), which provides:

"Where not inconsistent with the provisions of this chapter, the jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding."

STATEMENT OF THE CASE

Four appeals are involved in this matter, namely:

(a) Appeal from Interlocutory Order Reinstating Employees with Back Pay, filed February 25, 1952 (Tr. p. 28).

(b) Appeal from Order Reinstating Employees with Back Pay, filed May 21, 1952 (Tr. p. 59).

(c) Appeal from Order Requiring Trustee and Appellant to file Supersedeas Bond, filed May 21, 1952 (Tr. p. 58).

(d) Appeal from Order Retaxing Costs, filed July 18, 1952 (Tr. p. 86).

All of the orders appealed from were entered in proceedings pursuant to Chapter X of the *Bankruptcy Act* entitled "In the matter of Coastal Plywood & Timber Company, a Corporation, Debtor (No. 12223)," which proceedings are pending in the Northern Division of the United States District Court for the Northern District of California.

Appellant was appointed Trustee of said Debtor on November 1, 1951, by Order naming him as such and pre-

scribing his powers and duties (Tr. pp. 3-8, 48-49), in which Order it is provided (Tr. p. 5):

> "It is Further Hereby Ordered that the trustee appointed herein be and he is hereby authorized and directed, pending further order herein, to conduct and operate the business of the debtor and to manage, maintain and keep in proper condition and repair the assets, properties and business of the debtor, wherever situated; to employ and discharge, and to fix, subject to the approval of the court, the rate of compensation of all officers, managers, superintendents, agents and employees; * * *."

In due course, thereafter, the District Court wherein such proceedings were pending made its Order approving the retention of the appellant in office as such Trustee (Tr. p. 8).

On and prior to December 28, 1951, each of the appellees was an employee of the Debtor, and each of the appellees was then, and now is, the holder of one share of the outstanding capital stock of the Debtor (Tr. p. 36). Effective as of the close of business on December 28, 1951, each of the appellees was discharged from the employment of the Debtor by appellant, acting through his general manager (Tr. p. 50).

At the time each of the appellees purchased his share of stock in the Debtor, the Articles of Incorporation of the Debtor limited stock ownership to active employees and persons acceptable to the Board of Directors as future active employees (Tr. pp. 36, 37, 168). Said Articles further provided that a stockholder may not "sell, transfer or assign his share" until and unless he first gives to the officers of the Debtor written notice of his intention and

extends to the Debtor an option to purchase such share (Tr. p. 37).

Paragraph (d) of Article IX of said Articles of Incorporation contained the following provision (Tr. p. 39):

> "The specific provisions governing discharge, retirement, or disability shall be set forth in the Bylaws."

This provision was also set forth on the stock certificates issued to appellees (Tr. pp. 106-112). Section 2 of Article V of the by-laws of the Debtor at that time provided (Tr. pp. 45, 197):

> "Section 2. Discharge:
>
> "A Class 'A' stockholder employee may not be discharged except with the approval of the majority of the members of the Board of Directors who are elected by the Class 'A' stockholders. If the Class 'A' stockholder so discharged is unwilling to accept the decision of said Director, he may request in writing of the President, Vice-President or Secretary, within ten (10) days of such decision, that this discharge be reviewed at a meeting of the Class 'A' stockholders called for the purpose in accordance with the provisions of the Bylaws. Unless a majority of the stockholders voting at such meeting approves such discharge, it shall not be effective."

Article VIII of said by-laws authorized the amendment of said by-laws in the following manner (Tr. p. 200):

> "Article VIII.
>
> "Amendments"
>
> "Except as herein provided, these Bylaws may be amended or repealed or new Bylaws may be adopted

only by a majority vote of the holders of each class of stock, voting separately.

"Article II, Section 3(a) and Article V, Sections 1, 2, and 3, may be amended and shall only be amended by majority vote of the Class 'A' stockholders. Article II, Section 3(b) may be amended and shall only be amended by majority vote of the Class 'B' stockholders."

On September 10, 1950, by vote of a majority of the stockholders of the Debtor, its by-laws were duly amended so as to eliminate the above-quoted provisions relating to "Discharge" of shareholders and to substitute the following provision (Tr. pp. 47, 48, 140-153, 201-209):

"The General Manager shall have general supervision and direction of the business and affairs of the corporation. Without limiting, except as otherwise herein provided, his other powers, he may employ, suspend and discharge such agents and employees of the corporation as he may from time to time deem necessary, and prescribe their duties, terms of employment and compensation."

This amendment was made at the request of representatives of the principal creditors of the Debtor (Tr. pp. 140-145). The trial court concluded that, although this amendment was authorized by the by-laws as they existed prior to the amendment, it did not abrogate the rights of appellees under such pre-existing by-laws and ordered that appellees be reinstated and that they be reimbursed for lost wages (Tr. pp. 27, 47, 48, 53-54).

Thereafter, the trial court directed appellant to file a supersedeas bond in the amount of $10,000 in connection

with these appeals (Tr. pp. 56-58), but this order was stayed by this Honorable Court on July 9, 1952.

On June 6, 1952, the Clerk of the United States District Court taxed and allowed against the appellant costs in the sum of $4 (Tr. pp. 81-82). On July 11, 1952, upon motion by appellees, the United States District Court retaxed costs to allow the additional sum of $203.20, constituting the sum of $4 for the cost of a transcript of certain remarks of the District Court and the sum of $199.20 for witness fees and mileage (Tr. pp. 82-85). With one exception, the sum claimed as witness fees and mileage was for the attendance of appellees (Tr. pp. 89-105).

ASSIGNMENTS OF ERROR

1. Orders Reinstating Appellees with Back Pay.

The first two appeals are directed to the interlocutory and subsequent Orders reinstating appellees with back pay (Tr. pp. 28, 59). The errors relied upon by appellant in seeking reversal of these Orders are set out in the "Statement of Points upon which Appellant Intends to Rely on Appeal from Order Reinstating Employees with Back Pay, Filed May 16, 1952," as follows (Tr. pp. 79-81):

> "1. The District Court erred in denying appellant's motions to dismiss the petition for reinstatement of employees with back pay.
>
> "2. The District Court erred in including in said Order last above referred to and filed herein upon the 16th day of May, 1952, the provision requiring said Trustee to re-employ said petitioners named in said Order, and further in ordering that said Trustee pay to said petitioners and each of them the amounts set forth in said Order. The said District Court further

erred in ordering and directing said Trustee to pay to said petitioners any sums or amounts whatsoever.

"3. The District Court erred in granting the petition of said petitioners and further in ordering said Trustee to re-employ and reinstate said employees in their former or any other positions or employments.

"4. The District Court erred in granting the petition of petitioners for specific performance of their contract for personal services.

"5. The District Court erred in not holding that the original contract of employment contained on the back of the stock certificate issued to each of petitioners was amended and changed by the Amended Bylaws adopted by Debtor on September 10, 1950.

"6. The District Court erred in holding that Section 7 of Article III of said Bylaws, duly and regularly adopted by the said Stockholders of said Debtor on the 10th day of September, 1950 and reading as follows, to wit:

'Section 7. General Manager. The General Manager shall have general supervision and direction of the business and affairs of the corporation. Without limiting, except as otherwise herein provided, his other powers, he may employ, suspend and discharge such agents and employees of the corporation as he may from time to time deem necessary, and prescribe their duties, terms of employment and compensation', did not give to and empower said General Manager of said Debtor full and uncontrolled right, power and authority to employ and discharge agents and employees of said Debtor at any time and for any reason or purpose whatsoever and which to him seemed best.

"7. The District Court erred in not holding that the failure of petitioners to offer their stock to Debtor,

as required by its Articles of Incorporation and/or Bylaws, before granting to a third party an option to purchase the same constituted a breach of contract with Debtor which entitled Debtor and appellant herein to discharge petitioners and each of them from their and each of their employment with Debtor.

"8. The District Court erred in substituting its judgment for that of the Trustee, appellant herein, and his General Manager in the ordinary operations of Debtor."

2. Order Requiring Appellant to File Supersedeas Bond.

Appellant relies upon the following specifications of error in his appeal from this Order (Tr. pp. 73-74):

"1. The District Court erred in making the Order requiring Trustee and Appellant to file a supersedeas bond and filed in the above-entitled Court on or about the 16th day of May, 1952.

"2. The District Court erred in requiring said Trustee and Appellant to cause to be prepared and filed with said Court a supersedeas bond in the sum of Ten Thousand Dollars conditioned as set forth in said Order.

"3. The District Court was without right, power or jurisdiction to make said Order filed herein as aforesaid on or about May 16, 1952, or to require said Trustee as a Trustee in Bankruptcy and an appellant herein to make or file said supersedeas bond.

"4. The District Court erred in making its said Order requiring said Trustee and appellant to make said payments to said petitioners in the amounts set forth in said Order.

"5. The District Court erred in providing in said Order that said requirement for the payment of said sums to said petitioners as set forth in said Order should be made part of or become part of the Inter-

locutory Order reinstating employees with back pay upon the ground, among others, that an appeal had been taken from said Interlocutory Order reinstating employees with back pay prior to the making of said Order filed herein on or about May 16, 1952, and that by reason thereof said Court was without jurisdiction, right or authority to make said Order filed on or about May 16, 1952, a part of said Interlocutory Order reinstating employees with back pay."

3. Order Granting Motion to Retax Costs.

Appellant assigns the following errors with respect to the Order granting appellees' motion to retax costs (Tr. p. 87):

"1. The District Court erred in denying appellant's motion to retax costs on the proceedings to compel the reinstatement of appellees with back pay.

2. The District Court erred in allowing the items of $4.00 for the transcript of remarks of the Court at the conclusion of the argument on Friday, February 15, 1952.

3. The District Court erred in allowing witness fees and mileage as per Schedule I attached to the costs bill, filed herein and amounting to $199.20."

The foregoing assignments of error are expanded hereinafter under the Argument relating to the individual orders.

ARGUMENT

I.

The Trial Court Erred in Ordering Reinstatement of Appellees with Back Pay

Appellees assert, and the trial court held, that their dismissal on December 28, 1951, was a breach of their employment contracts embodied in the Articles of Incorporation and by-laws of the Debtor. We respectfully submit that the trial court erred in so ruling for the reasons that:

(A) The contract originally existing between appellees and debtor was amended on September 10, 1950, to eliminate the provisions relied upon by appellees; such provisions were not in effect at the time of the discharge of appellees on December 28, 1951 and are not now in effect.

(B) Appellees breached their contracts with the Debtor and thereby subjected themselves to dismissal.

(C) Furthermore, the attempt of appellees to compel appellant, as trustee, to re-employ them is an attempt to compel specific performance of a personal service contract, which is prohibited by the statutes of the State of California and by the decisions of the California and Federal Courts.

A. THE CONTRACT ORIGINALLY EXISTING BETWEEN APPELLEES AND THE DEBTOR WAS AMENDED ON SEPTEMBER 10, 1950, TO ELIMINATE THE PROVISIONS RELIED UPON BY APPELLEES; SUCH PROVISIONS WERE NOT IN EFFECT AT THE TIME OF THE DISCHARGE OF APPELLEES ON DECEMBER 28, 1951, AND ARE NOT NOW IN EFFECT.

Specifically, appellees rely upon Section 2 of Article V of the by-laws of the Debtor as they existed when appellees acquired their stock in the Debtor. This Section then provided (Tr. p. 45):

"Section 2. Discharge:

"A Class 'A' stockholder employee may not be discharged except with the approval of the majority of the members of the Board of Directors who are elected by the Class 'A' stockholders. If the Class 'A' stockholder so discharged is unwilling to accept the decision of said Directors, he may request in writing of the President, Vice-President or Secretary, within ten (10) days of such decision, that his discharge be reviewed at a meeting of the Class 'A' stockholders called for the purpose in accordance with the provisions of the Bylaws. Unless a majority of the stockholders voting at such meeting approves such discharge, it shall not be effective."

With this exception, the contract between the Debtor and appellees has never restricted discharge of the appellees; the Articles of Incorporation and stock certificate both refer to the by-laws for provisions relating to discharge (Tr. pp. 39, 112).

Admittedly, the above-quoted restrictions were not complied with in the present case. However, appellees' petition ignores Article VIII of said by-laws, which provided for amendments thereto, as follows (Tr. p. 200):

"Article VIII.

Amendments

"Except as herein provided, these Bylaws may be amended or repealed or new Bylaws may be adopted only by a majority vote of the holders of each class of stock, voting separately."

Article II, Section 3(a) and Article V, Sections 1, 2 and 3, *may be amended* and shall only be amended by majority vote of the Class 'A' stockholders. Article II,

> Section 3(b) may be amended and shall only be amended by majority vote of the Class 'B' stockholders."*

They further ignore the fact that subsequently, on or about September 10, 1950, the by-laws were amended, as authorized by the above quoted Article VIII thereof, to eliminate the provisions relating to discharge of employees and to provide in their place and stead that the General Manager could at any time, for any reason, discharge employees. The lower Court so found (Tr. pp. 47-8):

> "5. Subsequently on or about September 10, 1950, the bylaws of the Debtor company were amended by a vote of a majority of its shareholders, as authorized therein, to, among other things, eliminate the aforesaid provisions relating to job security and job tenure which had theretofore constituted part of said bylaws and to include the following further provision, to wit:
>
> 'Section 7. General Manager: The General Manager shall have general supervision and direction of the business and affairs of the corporation. Without limiting, except as otherwise herein provided, his other powers, he may employ, suspend and discharge such agents and employees of the corporation as he may from time to time deem necessary, and prescribe their duties, terms of employment and compensation.'"

We are unable to perceive how appellees can claim any rights whatsoever under former Section 2 of Article V of the Debtor's By-laws since this section had been duly and effectively eliminated over a year prior to their discharge. It is axiomatic, of course, that where a contract contains

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*Unless otherwise noted, all emphasis herein is ours.

a provision for its amendment in a prescribed manner, an amendment adopted in such manner is binding upon all of the parties to the contract. Necessarily so, since that is the agreement of the parties.

This axiom would appear to have particular application to contracts embodied in corporate articles and by-laws, since the power of amendment in a feasible manner is vital when the parties to a contract are numerous. That it does have application to such contracts has been squarely and unequivocally recognized by the California Supreme Court on a number of occasions. Thus, in *Baldwin v. Miller & Lux,* 152 Cal. 454, the California Supreme Court held that a written agreement for the formation of a corporation and the articles of incorporation thereof could be amended to require the distribution of a stated sum annually among interested parties, and the sale of property for that purpose, and that such amendment was binding upon stockholders who voted against, as well as those who voted for, the amendment. In this connection, the Court stated:

> "* * * 2. It was contended in the petition for rehearing that there was no power to amend the articles of incorporation so as to provide for the annual division of at least three hundred and sixty thousand dollars among the parties interested, or so as to require the sale of sufficient property for that purpose. The point is not well taken. *The original agreement provided that, as to the subdivisions numbered 7 to 11, inclusive, of the agreement, and the corresponding subdivisions of the articles of incorporation, amendments could be made by the vote or written consent of stockholders representing at least four fifths of the capital stock. This was binding on the appellant, and such*

> *amendments could be made by four fifths of the stockholders without her consent and against her will.*" (152 Cal. at p. 458)

In fact, the power of amendment need not be expressed in the corporate charter or by-laws but may be supplied by law. See *Schroeter v. Bartlett Syndicate Bldg. Corp.*, 8 Cal.(2d) 12, and *DeMello v. Dairyman's Co-op. Creamery*, 73 C.A.(2d) 746, enunciating and applying the settled rule that the contract between a corporation and its stockholders embodies the articles of incorporation, by-laws *and all pertinent statutes*, including the reserved power to amend such laws.

As a corollary of this rule, it has been held that the articles of incorporation may be amended to make outstanding shares of capital stock assessable, even for the purpose of paying debts existing prior to the amendment. *Wilson v. Cherokee Drift Mining Co.*, 14 Cal.(2d) 56. The California Supreme Court found no merit in the contention that, because stock was not assessable when the complaining shareholders purchased their stock, the amendment resulted in an impairment of their contracts, stating:

> "The first and principal contention of plaintiff is that the assessment in this case involves a denial of due process of law, and an impairment of the obligation of contract. The right of the corporation to amend its articles to provide for the power of assessment is of course conceded, and it is likewise conceded that *one who becomes a stockholder makes his contract in anticipation of any possible changes in the law under the state's reserved power* (see, generally, Ballantine & Sterling, California Corporation Laws, 1938 ed., p. 5; *Heller Inv. Co. v. Southern T. & T. Co.*, 17 Cal. App.

(2d) 202; (61 Pac.(2d(807)); but it is asserted that to assess the stockholder for debts existing prior to the amendment of the articles is an unconstitutional application of the law.

"Plaintiff relies upon *Rainey v. Michel,* 6 Cal.(2d) 259; (57 Pac.(2d) 932, 105 A.L.R. 148), a case wholly distinguishable, for there the attempt was made to apply a *new law* imposing a special stockholders' liability to *creditors* for debts incurred prior to the law's enactment. This court pointed out that at the time the debts were contracted the creditors had no such right against the stockholders, and declared that to impose this liability retroactively would be a denial of due process. This case, dealing with liability to creditors, has no relevancy where, as here, *we are concerned with the interrelations of the corporation and its stockholders.* (See *Schroeter v. Bartlett Syndicate Building Corp.,* 8 Cal.(2d) 12 (63 Pac.(2d) 824); *Heller Inv. Co. v. Southern T. & T. Co., supra.*)

"When plaintiff became a stockholder he knew that under the law then in existence the power of assessment could be conferred on the corporation by amendment of the articles, and that this power could be exercised to raise funds for the corporation, for the purpose of paying any debts of the corporation owed at the time the assessment was levied, regardless of when they were incurred. No violation of his constitutional rights was involved in the making of that assessment." (14 Cal.(2d) at pp. 57-58)

To the same effect see:

Farbstein v. Pacific Oil Tool Co., Ltd., 127 Cal. App. 157.

These principles are equally applicable to hybrid corporations containing many of the characteristics of a co-

operative. Thus in *Caldwell v. Grand Lodge,* 148 Cal. 195, it was held that a member of a mutual benefit society was bound by an amendment to a by-law which limited beneficiaries to members of his family, blood relatives and dependents, even though the by-laws at the time he became a member permitted any person or persons to be named beneficiaries. In this connection, the Court stated:

> "Baker joined the order, agreeing specifically to abide by and conform to the by-laws in force or subsequently to be adopted. His compliance with such laws as were then in force or might thereafter be enacted was by his express agreement made a condition by which he was entitled to participate in the beneficiary fund of the order; and where the contract between the member and the order is as here disclosed *it is never to be disputed* that all subsequent rules, regulations, and by-laws, not in themselves unreasonable, against express law or public policy, enter into and govern all of his rights and relationship with the association. (*Wist v. Grand Lodge,* 22 Or. 271, [29 Pac. 610, 29 Am. St. Rep. 603]; *Masonic Ben. Assn. v. Serverson,* 71 Conn. 719 [43 Atl. 192].)" (148 Cal. at p. 199)

See also:

De Mello v. Dairyman's Coop. Creamery, 73 Cal. App. (2d) 746, 750.

This settled principle of California law is squarely applicable here. See *Vanston Bondholders Protective Committee v. Green,* 329 U.S. 156, 161, 67 S.Ct. 237, 239; *Bryant v. Swofford Bros. Dry Goods Co.,* 214 U.S. 279, 290-91, 29 S.Ct. 614, 618; *Urban Properties Corp. v. Benson* (C.C.A.

9), 116 Fed.(2d) 321, holding that state law is to be applied in determining the rights of claimants against a debtor in reorganization or bankruptcy proceedings.

Moreover, the rule in other jurisdictions is the same. See, e.g.:

Hottenstein v. York Ice Machinery Corp. (C.C.A. 3), 136 Fed.(2d) 944, 950.

("The right of the preferred stockholder in the instant case is to receive payment of his unpaid dividends in preference and priority to the payment of any dividend on the common stock. * * * Such a right should not be given the status of a vested property right in view of the power of self-amendment conferred on the defendant * * *. *In view of the power of self-amendment conferred upon the defendant we think it is clear that the intervening complainant may not claim the protection of the Contract Clause.*")

Sovereign Camp, W.O.W. v. Smith (Okla.), 56 Pac. (2d) 408, 410-11;

Bookman v. R. J. Reynolds Tobacco Co. (N.J.), 48 Atl.(2d) 646, 655;

Reynolds v. Supreme Council Royal Ancanum (Mass.) 78 N.E. 129, 131;

Glos v. Bain (Ill.), 79 N.E. 111, 117;

Crittenden v. Southern Home Building & Loan Assn., 36 S.E. 643, 645-6.

When each of the appellees acquired his share of stock in the Debtor, the by-laws expressly provided that they might be amended in a specific manner. In fact, Article VIII of said by-laws contained, both at the time such stock was acquired and at the time of the amendment relied

upon by appellant, a special provision governing amendment of certain specified provisions of the by-laws, including the provision upon which appellees rely, viz. Section 2 of Article V (Tr. p. 200). The second paragraph of Article VIII expressly provided that "Article V, Sections 1, 2, and 3, may be amended * * * by majority vote of the Class 'A' stockholders." Thus, we are not here interpreting a general power of amendment, but a *specific* power to change a *specific* provision. The amendment eliminating the restrictions upon which appellees rely was duly adopted, as the trial court found, in the manner authorized by the by-laws (Tr. p. 47). Appellees are therefore bound by the amendment and can claim no contract right to continuous employment. Their discharge by appellant, acting through the general manager, thus gave rise to no right of reinstatement or reimbursement of back pay.

Employees, as well as other persons, are bound by their contracts. Such was the ruling of the United States Supreme Court in *National Labor Relations Board v. Sands*, 306 U.S. 332, 59 S.Ct. 508, where it was stated:

> "The Board finds that, in this situation, the respondent was under an obligation to send for the shop committee and again to reason with its members or to wait until the situation became such that it could operate its whole plant without antagonizing the employes' views with respect to departmental seniority. We think it was under no obligation to do any of these things. There is no suggestion that there was a refusal to bargain on August 21st. There could be, therefore, no duty on either side to enter into further negotiations for collective bargaining in the absence of a request therefor by the employes. No such request was

made prior to September 4th. Respondent rightly understood that the men were irrevocably committed not to work in accordance with their contract. *It was at liberty to treat them as having severed their relations with the company because of their breach* and to consummate their separation from the company because of their breach and to consummate their separation from the company's employ by hiring others to take their places. The Act does not prohibit an effective discharge for repudiation by the employe of his agreement, any more than it prohibits such discharge for a tort committed against the employer. As the respondent had lawfully secured others to fill the places of the former employes and recognized a new union, which, so far as appears, represented a majority of its employes, the old union and its shop committee were no longer in a position on September 4th to demand collective bargaining on behalf of the company's employes.

"It is urged that the company's offer to re-employ four men as foremen on the basis of guaranteed annual compensation, at a lower hourly rate than had theretofore been paid them, is evidence to support the Board's finding of a refusal to bargain collectively with the union. The argument is that if the company had made a similar offer to all of the men this might have formed a basis of compromise, since one of the employes to whom an officer talked indicated that the men might be willing to take a cut in wages; but there is no evidence that the company had any thought of offering a similar contract to others than the foremen of departments, and the breach of contract of which the men were guilty left the company under no obligation to initiate negotiations for a new and different contract of employment with them. * * *" (306 U.S. at pp. 343-5, 59 S.Ct. at pp. 514-15.)

B. APPELLEES BREACHED THEIR CONTRACTS WITH THE DEBTOR, AND, BY REASON THEREOF, SUBJECTED THEMSELVES TO DISMISSAL.

Article IX, Section (a) of the Bylaws of Debtor, existing at the time appellees purchased their stock and still in full force and effect, provides that before any holder of stock may transfer or assign the same, it must first be offered to the company (Tr. p. 37). This appellees did not do (Tr. pp. 14, 16, 88, 89). Having admitted their failure to comply with their contracts, they may not now complain of a *subsequent* breach on the part of the Debtor. Under the settled doctrine enunciated in *National Labor Relations Board v. Sands,* quoted *supra,* appellant was well within his rights in discharging appellees. See also *Lewis Publishing Co. v. Henderson,* 103 Cal. App. 425, 429; *Rathbun v. Security Mfg. Co.,* 82 Cal. App. 793, 796; *Ravales v. Los Angeles Creamery Co.,* 36 Cal. App. 171. As stated in *Rathbun v. Security Mfg. Co., supra,* "It is elementary that one party cannot compel another to perform while he himself is in default under the contract." (82 Cal. App. at p. 796.)

C. THE PETITION OF APPELLEES CONSTITUTES AN ATTEMPT ON THEIR BEHALF SPECIFICALLY TO ENFORCE PERSONAL SERVICE CONTRACTS, WHICH THE LAW DOES NOT PERMIT.

The petition of appellees (Tr. pp. 10, 12) alleges that they are entitled to "job tenure" by virtue of the contract embodied in the Articles and by-laws of the Debtor. In the prayer of such petition (Tr. p. 18) appellees pray that they be reinstated as employees of the Debtor. Such allegations and prayer definitely establish the petition as an attempt to specifically enforce contracts which, appellees assert, insure their continued employment by the Debtor.

That such contracts are not specifically enforceable is established by the Statutes and decisions of the courts of

this State and by the decisions of the Federal Courts. Thus, Section 3390 of the *Civil Code of the State of California* provides, in part, as follows:

> "The following obligations cannot be specifically enforced:
>
> (1) An obligation to render personal service;
>
> (2) *An obligation to employ another in personal service;* * * *"

The leading case establishing this rule in California is *Poultry Producers, Etc. v. Barlow,* 189 Cal. 278, where it was held that an agreement between a corporation organized by poultry raisers and a stockholder thereof requiring the latter to sell all of his products for certain stated years to the corporation, and obligating the corporation to resell the products and pay over the proceeds to the stockholder, is not enforceable either by injunction or by decree of specific performance, since such a contract is one of agency calling for services of the corporation of a highly personal nature. In this connection the Court stated:

> "The rule that equity will not specifically enforce an obligation to render personal service has been assigned three distinct reasons for its existence. Some courts have based the rule upon the fact that it would be an invasion of one's statutory liberty to compel him to work for, or to remain in the personal service of, another. It would place him in a condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction. Another reason assigned for the rule, according to some of the authorities, is that, in view of the peculiar personal relation that results from a contract of ser-

vice, it would be inexpedient, from the standpoint of public policy, to attempt to enforce such a contract specifically. It is said by the judges who based the rule upon this consideration of public policy that, where one of the contracting parties is to act as the confidential agent of the other, it is necessary, not only for the parties, but for the sake of society at large, that there should be entire harmony and a spirit of co-operation between the contracting parties. The third reason for the rule, as given by other authorities, is that it is inconvenient, or, as others express it, impossible, for a court of justice to conduct and supervise the operations incident to and requisite for the execution of a decree for the specific performance of a contract which involves the rendering of personal services. For a discussion of these three bases of the rule, see the note to H. W. Gossard Co. v. Crosby, 6 L.R.A. (N.S.), p. 1125 et seq. * * *." (189 Cal. at pp. 288-9)

The *Poultry Producers* case has been cited with approval numerous times in subsequent decisions of the courts of this State, the last one, so far as we can ascertain, being *Columbia Pictures Co. v. DeToth,* 26 Cal.(2d) 753, at p. 761. To review all of the cases intermediate between the *Poultry Producers* and the *Columbia Pictures Co.* cases would only encumber this brief and would serve no useful purpose. The principles there involved are squarely applicable to the present case, and, we respectfully submit, compel a reversal of the decision of the lower court.

While, as already noted, appellee's rights are determined by California law, it might be pointed out that the rule applied in other jurisdictions, by both the Federal and State

courts, is the same. See, e.g., *Bethlehem Engineering Export Co. v. Christie* (C.C.A. 2), 105 F.(2d) 933, 935 ("* * * even though the discharge of an agent be a breach of contract which gives him a right of action, the court will not restore him to his position."); *Bach v. Friden Calculating Mach. Co.* (C.C.A. 6, 1946), 155 Fed.(2d) 361; *Allbee v. Elms* (N.H.), 37 A.(2d) 790; *Hoffman Candy & Ice Cream Co. v. Department of Liquor Control* (Ohio), 96 N.E.(2d) 203; 49 Am. Jur., *Specific Performance,* Sec. 137, pp. 160-161.

Accordingly, we respectfully submit that the decision of the District Court compelling reinstatement of appellees and reimbursement for back pay must be reversed for the reasons that:

(1) The original contracts between appellees and the Debtor, providing for the manner of appellees' discharge, were effectively amended prior to their discharge to provide that such discharge rested in the judgment of the General Manager alone; therefore no breach of their contract resulted from the discharge.

(2) In any event, appellees themselves breached said contract prior to the discharge by extending an option to purchase their shares without first offering them to the Debtor; and

(3) The petition of appellees is an attempt to compel specific performance of personal service contracts, contrary to the statutes of the State of California and the decisions of the California and Federal Courts.

II.

The Court Erred in Ordering Appellant to File a Supersedeas Bond

Preliminarily, it might be noted that if this Court reverses the District Court on either of the grounds set forth in subdivisions I or II of this Argument, this particular appeal would become moot.

On the same day that the District Court made its final order for the re-employment of appellees, it also made its order requiring the appellant to file a supersedeas bond, which order is set out in full at pages 56 to 58, inclusive, of the Transcript. To this order appellant in due course filed his appeal (Tr. p. 58), together with his designation of points upon which he intended to rely in his appeal from such order (Tr. pp. 73-74). Appellant thereupon applied to this Honorable Court for an order staying the order of the District Court requiring the filing of a supersedeas bond, and, after argument thereon, on the 9th day of July, 1952, this Honorable Court made its order reading as follows:

"Order Granting Motion of Appellant for Stay of Order

"Upon consideration of the motion of appellant for an order staying the order of the United States District Court for the Northern District of California, dated May 14, 1952, requiring appellant to post a supersedeas bond on its appeal herein, and of the opposition thereto, and oral arguments had by counsel for respective parties, and good cause therefor appearing,

"It Is Ordered that said motion be, and hereby is granted, and that all further proceedings on said order of May 14, 1952 be, and hereby are stayed pending determination of the appeal herein."

This Court had jurisdiction of the appellant's petition to stay such order for a supersedeas bond under the provisions of the *Federal Rules of Civil Procedure,* Sec. 62(g), which provides:

> "(g) Power of Appellate Court Not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."

Appellant herein is a Trustee appointed in proceedings pursuant to the *Bankruptcy Act.* By the provisions of Section 25(b) of said Act (11 U.S.C.A. Sec. 48(b)), he is relieved from the necessity of furnishing the supersedeas bond ordered by the lower Court. In said Section it is provided:

> "Receivers and trustees shall not be required *in any case* to give bond when they take appeals."

This Section was in full force and effect at the time the District Court required the giving of a supersedeas bond.

The order of the District Court was apparently based on Rule 73(d) of the *Federal Rules of Civil Procedure* (Tr. p. 57). This rule, however, obviously does not purport to change the *statutory* provision exempting trustees from the necessity of filing a bond. In fact, it is applicable only to those appellants who express a desire for a stay on appeal or who have requested or presented to the Court a supersedeas bond. Nothing in Rule 73(d) gives the Court juris-

diction to *force* an appellant to file a supersedeas bond. Here the Trustee (appellant) did not ask the lower Court for a stay; he therefore could not be compelled by such Court to file such a supersedeas bond. Appellant is relying upon Sec. 25(b) of the *Bankruptcy Act,* quoted above, as exempting him from the necessity of filing any bond in the present case.

We therefore respectfully submit that the order of the District Court requiring such supersedeas bond was error and should be reversed.

III.

The Court Erred in Retaxing Costs Against Appellant

As in the case of Point II hereinabove, if this Court reverses the lower Court on either of the grounds set forth in subdivisions I or II of this Argument, this particular appeal becomes moot.

After entry of the final order requiring the reinstatement of appellees, they filed a memorandum of costs and disbursements aggregating $207.20 (Tr. pp. 60-63). Attached to such memorandum was a schedule setting forth witness fees and mileage claimed by appellees, aggregating $199.20. With the exception of the sum of $16.60, claimed as the fee and mileage for Wesley Cross, all of these fees and mileage were for the attendance of the appellees themselves, to testify in their own behalf. To this memorandum appellant in due course made a motion before the Clerk of the District Court at Sacramento to tax such costs by striking therefrom the item of $199.20 for witness fees and mileage and the further item of $4.00 for a transcript of remarks of the Court at the conclusion of the argument, which tran-

script was ordered by the attorney for appellees (Tr. pp. 70-72).

Thereupon, and in due course, the Clerk taxed the costs by disallowing the sum of $4.00 for the said transcript of remarks and also disallowing the witness fees and mileage on the ground that the witnesses were parties in interest and consequently were not entitled to witness fees or mileage (Tr. pp. 81-82).

Subsequently, appellees moved the District Court (Judge Harris) to retax costs (Tr. pp. 82-84). Thereafter, Judge Harris made an order granting the motion to retax costs (Tr. p. 85). Thereupon, appellant appealed from such order (Tr. p. 86) and filed his statement of points upon which he intends to rely on this appeal (Tr. p. 87).

1. COST OF TRANSCRIPT OF THE REMARKS OF THE COURT.

This item represents the cost of a transcript of certain remarks of the Court ordered, not by the Court, but by counsel for appellees, for his own convenience. It was upon that ground that it was denied by the Clerk of the District Court (Tr. pp. 81-2). We respectfully submit that the denial was proper. See *Pine River Logging & Improvement Co. v. U. S.,* 186 U.S. 279, 46 L.Ed. 1164; *Burnham Chemical Co. v. Borax Consolidated, Ltd.,* 7 F.R.D. 341; *Branfoot v. Hamilton,* 52 Fed. 390; *Stallo v. Wagner,* 245 Fed. 636.

2. WITNESS FEES AND MILEAGE.

With the exception of Wesley Cross, all of the witnesses for whom such fees and charges were claimed were the appellees in this proceeding. They were not subpoenaed by the Trustee and therefore are not entitled to fees or mileage; they were all testifying in their own behalf.

See *Picking v. Penn. R. Co.,* 11 F.R.D. 71, holding that a party is not entitled to witness fees or mileage for his own attendance and in his own behalf. See also:

Re Wahkeena, 51 Fed.(2d) 106;
The Philadelphia, 163 Fed. 438;
Hopkins v. General Electric Etc., 93 F. Supp. 424;
The Petroleum No. 5, 41 Fed.(2d) 268.

CONCLUSION

By reason of all of the foregoing, it is respectfully submitted that each and all of the appeals taken should be ruled upon in favor of appellant, and each of the orders of the District Court from which such appeals are taken should be reversed.

Respectfully submitted,

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